

1 The Honorable Marsha J. Pechman
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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10 DIANNE KELLEY and KENNETH HANSEN,) No. C 07-475 MJP
11 v.) Plaintiffs,) MICROSOFT'S MOTION FOR A
12)) PROTECTIVE ORDER
MICROSOFT CORPORATION, a Washington) PRECLUDING THE DEPOSITION
corporation,) OF STEVEN A. BALLMER
13)) Defendant.) *Noted for Consideration:*
14))) October 15, 2008
15))
16)
17)
18 **FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER (DKT. 57)**
19 **AND PENDING MOTIONS TO SEAL**
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I. INTRODUCTION

Microsoft asks the Court to follow settled law and issue a protective order relieving it of the obligation to produce its Chief Executive Officer, Steven A. Ballmer, for a day of deposition testimony. Mr. Ballmer has no unique personal knowledge of any facts at issue. He was not involved in the decisions with respect to the Windows Vista Capable program that Plaintiffs challenge; instead, he learned of those decisions only after the fact from subordinate Microsoft employees. In the next two weeks, Plaintiffs will take the depositions of the senior Microsoft executives responsible for and most familiar with the decisions at issue. Mr. Ballmer's deposition would add nothing.

Courts impose a strict standard on parties seeking to depose the heads of corporations, so-called “apex officers.” Courts recognize that apex officers have enormous responsibilities and time demands, and that litigants too easily can use depositions as tools of harassment. As a result, courts require that a party seeking to subject an apex officer to a deposition must show that the officer has unique or superior knowledge that the party cannot obtain through less invasive means. Plaintiffs cannot make that showing here.

II. FACTUAL BACKGROUND

A. The Windows Vista Capable Program and Plaintiffs' Claims

Plaintiffs challenge Microsoft's Windows Vista Capable program, which informed consumers who bought PCs loaded with Windows XP whether their PCs could run comparable versions of the yet-to-be-released Windows Vista, in the event they later chose to upgrade their operating system. (As the Court knows, only a small percentage of consumers actually upgrade.) Plaintiffs claim the program was unfair and deceptive under Washington's Consumer Protection Act. They assert that Microsoft set the technical requirements for computers to be designated "Windows Vista Capable" too low, so that some low-end Windows Vista Capable PCs could, if upgraded, run only Windows Vista Home Basic and could not run the enhanced features of premium editions of Windows Vista. Plaintiffs make this claim even though Microsoft never told anyone that every computer qualifying as

1 “Windows Vista Capable” would run those enhanced features. To the contrary, Microsoft,
 2 OEMs and retailers repeatedly announced—on Web sites, in print advertisements, in
 3 marketing materials, and in many other contexts—that machines labeled “Windows Vista
 4 Capable” might not run enhanced or premium features unless the PCs were designated
 5 “Premium Ready.”

6 On February 22, 2008, this Court entered a class certification order that “narrow[ed]
 7 and limit[ed] the theory on which Plaintiffs may pursue class claims.” Order Granting
 8 Plaintiffs’ Motion for Class Certification [Dkt. 128] at 17. The Court rejected Plaintiffs’
 9 request to certify their core claim that the Windows Vista Capable Program deceived
 10 consumers into buying budget PCs. Instead, the Court allowed Plaintiffs to pursue only a
 11 “price inflation” theory – i.e., a claim that the Windows Vista Capable Program “artificially”
 12 increased demand for affordable PCs that capably ran core elements of Vista but did not
 13 support advanced features such as Aero, which allegedly caused PC manufacturers and
 14 retailers to increase the prices of lower-end PCs over a nine-month period. Order [Dkt. 128]
 15 at 18, 20, 21-22. “Analyzing Plaintiffs’ claims through the lens of the ‘price inflation’
 16 theory,” the Court found that two common issues predominate: (1) Whether Microsoft’s
 17 Windows Vista Home Basic product offering “in truth” is fairly called “Vista”? (2) Whether
 18 the “Windows Vista Capable” marketing campaign artificially inflated demand for “Windows
 19 Vista Capable” PCs? Order [Dkt. 128] at 20.

20 Based on their recent motion for partial summary judgment, it appears that Plaintiffs at
 21 this late juncture in the case intend to advance yet another legal theory and introduce new
 22 issues that the Court has not certified for class treatment. Plaintiffs now claim that the
 23 technical requirements for the Windows Vista Capable program were unfair and deceptive
 24 simply because Microsoft decided only to recommend (instead of require) that PCs labeled
 25 “Windows Vista Capable” have graphics hardware that could support “WDDM” (the
 26 “Windows Display Driver Model”). Microsoft has not yet had an opportunity to respond to
 27

1 this new theory, which Plaintiffs did not allege in their original complaint or any amended
 2 complaints.

3 **B. Present Dispute**

4 Mr. Ballmer is the CEO of Microsoft. He was not involved in any of the operational
 5 decisions about the Windows Vista Capable program. Ballmer Decl. ¶ 3. Mr. Ballmer was
 6 not involved in establishing the technical requirements that PCs must satisfy to qualify for the
 7 Windows Vista Capable label. *Id.* He had no role in the decisions regarding the timing of
 8 that program. *Id.* He was not involved in formulating any marketing strategy or any public
 9 messaging surrounding the Windows Vista Capable program. *Id.* Mr. Ballmer has no unique
 10 knowledge of, and had no unique involvement in, any decisions regarding the Windows Vista
 11 Capable program. *Id.* All of his knowledge about those decisions came through others at
 12 Microsoft, most notably Jim Allchin, Microsoft's then Co-President, Platform Products &
 13 Services, and Will Poole, Microsoft's then Senior Vice President, Windows Client Business.
 14 *Id.*

15 On September 19, 2008, Plaintiffs' counsel wrote Microsoft's counsel and requested
 16 dates for Mr. Ballmer's deposition (as well as for the depositions of Messrs. Allchin and
 17 Poole, and another Microsoft employee). Rummage Decl. ¶ 2. Microsoft attempted to
 18 persuade Plaintiffs that such a deposition was unnecessary and, under the prevailing case law,
 19 inappropriate. *Id.* ¶ 3. Microsoft's counsel explained that Mr. Ballmer had no unique
 20 knowledge of any facts at issue, requested that Plaintiffs rethink their desire to depose him,
 21 and advised that (not surprisingly) Mr. Ballmer did not have any free days on his calendar
 22 before the discovery cut-off. *Id.* Plaintiffs said that their review of the documents produced
 23 by Microsoft led them to believe there was at least one phone call about which only Mr.
 24 Ballmer could testify. *Id.* Although Plaintiffs did not point to any other unique knowledge
 25 they believed Mr. Ballmer might possess, they insisted that he be made available for a full day
 26 of deposition. *Id.* Microsoft told Plaintiffs it would seek a protective order from the Court to
 27 preclude Mr. Ballmer's deposition, and Plaintiffs agreed that the Court should decide this

1 dispute. *Id.* Thereafter, on September 26, 2008 (before Plaintiffs had deposed Mr. Allchin
 2 and Mr. Poole to determine if they had a valid reason for requesting Mr. Ballmer's
 3 deposition), Plaintiffs served a deposition notice for Mr. Ballmer, noting his deposition for
 4 October 22, 2008 – long before Mr. Ballmer has a free day on his calendar. Rummage Decl.,
 5 Ex. A.

6 The parties have fulfilled their meet and confer obligations.

7 **C. Mr. Ballmer's Telephone Call with Intel**

8 Plaintiffs did not identify the phone call that piqued their interest in Mr. Ballmer or the
 9 documents allegedly evidencing it. Microsoft surmises, however, that Plaintiffs have in mind
 10 a call between Mr. Ballmer and the CEO of Intel Corporation in January 2006. In any event,
 11 the documents Microsoft has produced in this action with respect to that call illustrate the
 12 nature of Mr. Ballmer's role with respect to the Windows Vista Capable Program.

13 In January 2006, Microsoft was reviewing the timing and technical requirements for
 14 the Windows Vista Capable program. Intel had concerns that it would not be able to produce
 15 enough microprocessors in the required time frame to support Microsoft's exacting technical
 16 requirements for graphics hardware. Birk Decl. [Dkt. No. 164 (under seal)], Ex. A at 146
 17 (MS-KELL 75291). On the other hand, Intel had a sufficient supply of microprocessors to
 18 support a less demanding graphics requirement; it requested that Microsoft delay the start of
 19 the Windows Vista Capable program two months until PCs with Intel's high-end graphics
 20 microprocessors could be widely available in stores. *Id.* These discussions took place
 21 between Will Poole, then Senior Vice President of the Windows Client business of Microsoft
 22 and Renee James, his primary contact at Intel. *Id.*, Ex. A at 76, 146 (MS-KELL 48377 &
 23 75291).

24 At one point, Ms. James told Mr. Poole that Intel's CEO Paul Otellini wanted to
 25 mention to Mr. Ballmer "as a courtesy" that the two companies had "agree[d] to disagree."
 26 *Id.*, Ex. A at 66 (MS-KELL 48294). Mr. Otellini then called Mr. Ballmer, who did not even
 27 have a chance to report the call to Mr. Poole before Mr. Poole had resolved the concerns. *Id.*,

1 Ex. A at 267 (MS-KELL 99306 (“I had not even had a chance to report [Otellini’s] issues
 2 when Will told me he had solved them”)). When Mr. Poole wrote Mr. Ballmer to explain the
 3 resolution, Mr. Poole explained, “This change completely resolves their problem … No
 4 further action is required from you. If you’re interested in understanding the entire story, I’m
 5 happy to write it up for you.” *Id.*, Ex. A at 82 (MS-KELL 48478). When Mr. Poole later
 6 explained that all of Intel’s concerns had been satisfied, Mr. Ballmer responded “I know
 7 nothing of the details please advise.” *Id.*, Ex. A at 80 (MS-KELL 48476). Mr. Ballmer also
 8 immediately wrote to Jim Allchin, Microsoft’s Co-President of Platform Products & Services,
 9 and explained, “I had nothing to do with this Will handled everything. … I am not even in the
 10 detail of the issues.” *Id.*, Ex. A at 267 (MS-KELL 99306). Even Intel was aware that the
 11 decision on the technical requirements had been Mr. Poole’s, as Ms. James of Intel sent Mr.
 12 Poole a note stating, “Paul did send a note to Steve thanking him for listening and making
 13 these changes (I know you did it).” *Id.*, Ex. A at 140 (MS-KELL 74381).

14 As this narrative illustrates, Mr. Ballmer had no involvement in the details of the
 15 Windows Vista Capable program. In 2006 Mr. Ballmer had brief discussions about technical
 16 requirements and timing for the Windows Vista Capable program with executives from
 17 Microsoft’s business partners, including Intel. Ballmer Decl. ¶ 4. Those discussions took
 18 place at a general level. *Id.* Based on those discussions, Mr. Ballmer relayed the concerns of
 19 Microsoft’s business partners (such as Intel) to members of Microsoft’s management (such as
 20 Messrs. Allchin and Poole) responsible for making decisions regarding timing and technical
 21 requirements. *Id.* Mr. Ballmer did not direct Mr. Allchin or Mr. Poole to reach any particular
 22 business decisions in response to those discussions; instead, Mr. Allchin and Mr. Poole
 23 remained responsible for making and executing those decisions. *Id.* Mr. Ballmer’s
 24 knowledge of those decisions is entirely derivative and duplicative of Mr. Allchin’s and Mr.
 25 Poole’s knowledge. *Id.*

26 Plaintiffs requested the depositions of Mr. Poole and Mr. Allchin, and Microsoft
 27 agreed to make them available for depositions on mutually convenient dates in early October.

1 Rummage Decl. ¶ 6. Although Plaintiffs previously took days of deposition testimony from
 2 Microsoft under Rule 30(b)(6), they did not ask any questions about the facts surrounding Mr.
 3 Ballmer's telephone call with Mr. Otellini of Intel. Similarly, Plaintiffs have propounded
 4 over 200 requests for admission and several interrogatories to Microsoft, but have not asked a
 5 single question about the facts surrounding Mr. Ballmer's phone call with Mr. Otellini.

6 Finally, without the benefit of Mr. Ballmer's deposition, Plaintiffs filed a motion for
 7 partial summary judgment in which they request a ruling that Mr. Poole's decision regarding
 8 the technical requirements of the Windows Vista Capable program satisfies the first element
 9 of their CPA claim (i.e., that lowering the technical requirements for PCs to be labeled
 10 Windows Vista Capable was unfair or deceptive). Plaintiffs' motion makes clear that the
 11 decision on the technical requirements and timing for the Windows Vista Capable program
 12 fell to Mr. Poole. Plaintiffs mention Mr. Ballmer in passing in three places: once to note that
 13 the CEOs of Microsoft and Intel "exchanged pleasantries" after Mr. Poole told Intel of the
 14 new requirements, Motion [Dkt. No. 163] at 17:4; once to note that Mr. Ballmer asked Mr.
 15 Allchin to follow up with Mr. Poole about the decision, *id.* at 20:23; and once in reference to a
 16 press release from January 2007. *Id.* at 4:10-11. Having brought their summary judgment
 17 motion before seeking deposition testimony on the point, Plaintiffs obviously thought the
 18 Court could rule on this question regardless of what Mr. Ballmer said about the matter.

19 III. ARGUMENT

20 Although the Federal Rules of Civil Procedure contemplate broad discovery, Rule 26
 21 requires courts to balance the potential benefits of proposed discovery against its burdens:

22 [T]he court ***must limit*** the ... extent of discovery otherwise allowed by these rules
 23 ... if it determines that:

- 24 (i) the discovery sought is unreasonably cumulative or duplicative, or can be
 obtained from some other source that is more convenient [or] less burdensome;
- 25 (ii) the party seeking the discovery has had ample opportunity to obtain the
 information by discovery in the action; or
- 26 (iii) the burden ... of the proposed discovery outweighs its likely benefits

1 Fed. R. Civ. P. 26(b)(2)(C) (emphasis added). Rule 26 also permits the court to issue
 2 protective orders “to protect a party or person from annoyance, embarrassment, oppression, or
 3 undue burden or expense.” Fed. R. Civ. P. 26(c)(1). Among other things, Rule 26 expressly
 4 contemplates orders in appropriate circumstances “forbidding the disclosure or discovery” or
 5 “prescribing a discovery method other than the one selected by the party seeking discovery.”
 6 Fed. R. Civ. P. 26(c)(1)(A) & (C). “District courts have very broad discretion in fashioning
 7 discovery orders under Fed. R. Civ. P. 26(c).” *McDowell v. Calderon*, 197 F.3d 1253, 1256
 8 (9th Cir. 1999) (*en banc*).

9 “Virtually every court that has addressed deposition notices directed at an official at
 10 the highest level or ‘apex’ of corporate management has observed that such discovery creates
 11 a tremendous potential for abuse or harassment.” *Celerity, Inc. v. Ultra Clean Holding, Inc.*,
 12 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007); *see also Mulvey v. Chrysler Corp.*, 106
 13 F.R.D. 364, 366 (D.R.I. 1985) (board chairman “singularly unique and important individual
 14 who can be easily subjected to unwarranted harassment and abuse”). Thus, courts properly
 15 exercise their discretion under Rule 26 when they issue orders protecting senior or “apex”
 16 executives within a corporation. *E.g., Thomas v. IBM Corp.*, 48 F.3d 478, 483-84 (10th Cir.
 17 1995) (affirming protective order preventing deposition of IBM’s chairman); *Lewelling v.*
 18 *Farmers Ins. of Columbus, Inc.*, 879 F.2d 212, 218 (6th Cir. 1989) (chairman & CEO); *Salter*
 19 *v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979) (president). Indeed, many courts have
 20 issued protective orders or quashed deposition notices to protect apex executives from
 21 depositions. *E.g., Reif v. CNA*, 248 F.R.D. 448, 454 (E.D. Pa. 2008); *Gauthier v. Union Pac.*
 22 *R.R. Co.*, 2008 U.S. Dist LEXIS 47199, at * 14 (E.D. Tex. June 18, 2008); *Roman v.*
 23 *Cumberland Ins. Group*, 2007 U.S. Dist. LEXIS 96775, at * 3-4 (E.D. Pa. Oct. 26, 2007);
 24 *Celerity*, 2007 WL 205067, at * 5; *Evans v. Allstate Ins., Co.*, 216 F.R.D. 515, 517 (N.D.
 25 Okla. 2003); *Folwell v. Hernandez*, 210 F.R.D. 169, 173 (M.D.N.C. 2002); *Baine v. General*
 26 *Motors Corp.*, 141 F.R.D. 332, 335 (M.D. Ala. 1991); *Mulvey*, 106 F.R.D. at 366.

1 Courts have not provided these protections to insulate apex officers from the fact-
 2 finding process. Rather, courts simply balance the need for and utility of depositions of apex
 3 officers against the disruption to those officers' time demands and responsibilities, and the
 4 potential for harassment inherent in such depositions (as well as the potential impacts to the
 5 shareholders who depend on the complete attention of those officers). Courts therefore
 6 require that before subjecting an apex officer to a deposition, the party seeking the deposition
 7 must show that (1) the officer has unique or superior knowledge (2) that cannot be obtained
 8 through other, less invasive sources, such as interrogatories, depositions of lower-ranking
 9 employees, or a corporate deposition under Rule 30(b)(6). *E.g., Reif*, 248 F.R.D. at 451. And
 10 even if the party makes that showing, courts generally take a "wait and see" approach,
 11 initially deferring the deposition without prejudice to taking the deposition at a later time if
 12 alternate sources prove insufficient. *Id.* at 451-52 (discussing *Salter*, 593 F.2d at 551-52).

13 Plaintiffs cannot make the required showing here. Mr. Ballmer has no knowledge of
 14 the facts that is superior or unique such that Plaintiffs could not obtain the same information
 15 from other sources. Indeed, within the next two weeks, Plaintiffs will have the opportunity to
 16 take the depositions of the Microsoft senior executives actually responsible for the decisions
 17 at issue. Further, Plaintiffs could ask interrogatories about those decisions and/or Mr.
 18 Ballmer's involvement in them (but have not); could serve requests for admission about the
 19 same topics (but have not); or could request a corporate deposition under Rule 30(b)(6) on the
 20 same topics (but have not). Balancing Mr. Ballmer's limited, duplicative knowledge against
 21 his responsibilities managing all business aspects of one of the world's leading software
 22 companies, and considering Plaintiffs' ability to obtain the same information from other
 23 sources, the Court should enter a protective order with respect to Mr. Ballmer's deposition.

24 **A. Mr. Ballmer Has No Unique or Superior Knowledge of the Facts at Issue.**

25 To be subjected to a deposition, an apex officer must have personal knowledge of the
 26 facts and issues giving rise to a suit. *See Evans*, 216 F.R.D. at 519 (granting protective order
 27 where apex officers had no knowledge of facts of case). And even if the apex officer has

1 personal knowledge relevant to the suit, the party seeking discovery must show that the
 2 officer's knowledge is so superior or unique that the party seeking the deposition could not
 3 obtain the same information through other means. *See Baine*, 141 F.R.D. at 335.

4 *Baine* illustrates the general reluctance of courts to allow apex depositions to proceed
 5 absent a strong showing of superior or unique knowledge. *Baine* arose out of an allegedly
 6 defective passenger restraint system. During discovery, plaintiffs noticed the deposition of
 7 Edward Mertz, a vice president of General Motors and the executive in charge of the Buick
 8 division. Plaintiffs argued that the deposition was necessary because, during the development
 9 of the restraint system, Mr. Mertz used a prototype of the system and sent a memo to the
 10 engineering team detailing his impressions. The court, however, quashed the deposition
 11 notice, stating that “[t]he legal authority is fairly unequivocal in circumstances such as these”
 12 and finding that the plaintiffs had not “demonstrated that [the vice president] has any superior
 13 or unique personal knowledge of the restraint system or of the accident.” 141 F.R.D. at 334-
 14 35. In other words, it was insufficient for the plaintiffs to demonstrate that the vice president
 15 had some personal knowledge of the restraint system; instead, they had to show that the vice
 16 president had knowledge of the restraint system so superior or unique compared to the
 17 information obtainable from other sources (such as the engineers who designed the product)
 18 that to prohibit the deposition would deprive the plaintiffs of the information altogether.
 19 Because the vice president’s superficial comments about the restraint system in the memo
 20 demonstrated neither superior nor unique knowledge, the court concluded that the vice
 21 president should not be subjected to a deposition. *Id.* at 335-36.

22 Here, Mr. Ballmer has even less knowledge of the decisions regarding the technical
 23 requirements for and timing of the Windows Vista Capable program than the vice president of
 24 General Motors in *Baine*. Mr. Ballmer was not involved in those decisions. The documents
 25 surrounding the telephone call that Plaintiffs cited to justify the deposition confirm Mr.
 26 Ballmer’s recollection: after being told of the decision to relax the Windows Vista Capable
 27 requirements, Mr. Ballmer said he knew nothing of the details, which caused Mr. Poole—who

1 made the decisions—to offer to provide a written account if he was interested. In short, Mr.
 2 Poole made the decisions; Mr. Ballmer merely tried to relay general concerns from Intel's
 3 CEO to Mr. Poole, an attempt eclipsed when Mr. Poole implemented new Windows Vista
 4 Capable requirements before Mr. Ballmer could talk with him. Whatever Intel's CEO might
 5 have said to Mr. Ballmer makes no difference, because Mr. Poole made the decisions at issue
 6 before Mr. Ballmer had a chance to relay Mr. Otellini's comments.

7 **B. Plaintiffs Can Obtain the Information Sought through Other Sources.**

8 The Court also should grant a protective order because courts uniformly prohibit the
 9 deposition of apex officers where, as here, the party seeking the deposition may obtain the
 10 information by other means. Indeed, courts almost uniformly disallow depositions of apex
 11 officers until *after* the party seeking discovery exhausts less intrusive means of getting the
 12 information. *See, e.g., Thomas*, 48 F.3d at 483 (upholding order requiring depositions of
 13 lower-level employees before plaintiff would be permitted to depose defendant's chairman);
 14 *Salter*, 593 F.2d at 651 (upholding a protective order barring the deposition of a company's
 15 president until plaintiff could demonstrate that all other sources of information had been
 16 exhausted); *Reif*, 248 F.R.D. at 454 (requiring deposition of 30(b)(6) witness before plaintiffs
 17 could depose CEO); *Evans*, 216 F.R.D. at 519 (prohibiting deposition of CEO and senior vice
 18 presidents because the information sought should "be obtained from other sources without
 19 depositing these 'apex' officers"); *Baine*, 141 F.R.D. at 335 (quashing deposition of company
 20 vice president because "it has not been established that the information necessary cannot be
 21 had from [other individuals], interrogatories, or the corporate deposition").

22 Plaintiffs will have ample opportunities to explore Microsoft's reasons for setting the
 23 technical requirements and timing of the Windows Vista Capable program. Within the next
 24 week, they will take the depositions of the person responsible for these decisions (Mr. Poole,
 25 then a Senior Vice President) and his supervisor (Mr. Allchin, then the Co-President of the
 26 Platform Products & Services who reported to Mr. Ballmer). The following week Plaintiffs
 27 will take the deposition of Rajesh Srinivasan, another Microsoft employee involved in these

1 decisions. If Plaintiffs believe the results of those depositions are insufficient, they can seek
 2 additional depositions of others familiar with the decisions, including a Rule 30(b)(6)
 3 representative. Any of these deponents would have more knowledge of these facts than Mr.
 4 Ballmer.

5 **C. Any Unique Knowledge Mr. Ballmer Might Have Is Irrelevant.**

6 In balancing the costs and benefits of discovery under Rule 26, the Court must
 7 consider “the importance of the issues at stake, and the importance of the discovery in
 8 resolving the issues.” Fed. R. Civ. P. 26(b)(2)(C)(iii). Even if Mr. Ballmer had unique
 9 knowledge about some matter at issue that Plaintiffs could not obtain less intrusively from
 10 some other source (which he does not), that knowledge would be irrelevant to any issue in this
 11 action. Mr. Ballmer’s conversation with Intel’s CEO amounted to high-level generalities that
 12 Mr. Ballmer intended to relay to the responsible decision-makers for the Windows Vista
 13 Capable program. Ballmer Decl. ¶ 4. In any event, Mr. Poole made the decision regarding
 14 the technical requirements and timing of the Windows Vista Capable program *before* Mr.
 15 Ballmer could relay his conversation with Intel’s CEO to Mr. Poole. Thus, nothing Mr.
 16 Otellini might have said to Mr. Ballmer, or Mr. Ballmer to Mr. Poole, had any bearing on Mr.
 17 Poole’s decision. The fact that Plaintiffs moved for partial summary judgment based on the
 18 documentary evidence of Mr. Poole’s decision confirms that Mr. Ballmer has no information
 19 vital to their case.

20 Perhaps more important, the decisions themselves have no bearing on the remaining
 21 issues here. The Court narrowed the case to Plaintiffs’ “price inflation” theory and found two
 22 common issues germane to that claim: whether Windows Vista Home Basic is fairly called
 23 “Vista” and whether OEMs’ decisions (not required by Microsoft) to apply the Windows
 24 Vista Capable label to PCs that could run only Windows Vista Home Basic “artificially”
 25 increased demand and thereby inflated the price of computers that class members purchased.
 26 On these two issues, Microsoft’s reasoning in deciding how to structure the Windows Vista
 27 Capable Program has no bearing on the relevant proof. The price inflation theory that the

1 Court certified for class treatment *assumes* the minimum specifications that limited OEMs'
 2 discretion in deciding whether to affix the Windows Vista Capable label; asks whether
 3 Windows Vista Home Basic can fairly be called "Vista"; and then (if Plaintiffs can show that
 4 Windows Vista Home Basic *cannot* fairly be called "Vista") requires proof of a causal
 5 connection between the supposed mischaracterization, demand, and the prices consumers paid
 6 to retailers or directly to OEMs. The many variables that Plaintiffs must address in
 7 connection with that theory include the pricing decisions of OEMs and retailers, the
 8 information that Microsoft and retailers placed in the market about Windows Vista Capable
 9 computers, and the impact of the technical requirements for the Windows Vista Capable
 10 program on the pricing of non-Premium Ready Windows Vista Capable PCs.

11 What Mr. Ballmer and Intel's CEO may have said to each other in a courtesy call has
 12 no bearing on any of those variables.

13 IV. CONCLUSION

14 Microsoft requests that the Court issue a protective order precluding Plaintiffs from
 15 taking the deposition of its CEO, Mr. Ballmer.

16 DATED this 3rd day of October, 2008.

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1
2 CERTIFICATE OF SERVICE
3
4

5 I hereby certify that on October 3, 2008, I electronically filed the foregoing
6 Microsoft's Motion for Protective Order with the Clerk of the Court using the CM/ECF
7 system, and I further hereby certify that pursuant to agreement with plaintiffs' counsel, I have
8 caused the same to be sent in .pdf format by e-mail to the following:
9

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